Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-4811

NATHAN PENDLETON, *et al.*,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE APPELLATE DEPARTMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

MOTION TO DISMISS OR AFFIRM

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2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?

3. Does California Penal Code Section 311.2—the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so—violate the First and Fourteenth Amendments of the United States Constitution?

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Appellate Department of the Superior Court of the State of California, County of Orange, on the ground

that it is manifest that the questions presented by the appeal are so insubstantial as not to warrant further argument, and on the further ground that the judgment was properly affirmed by the state court.

STATEMENT OF THE CASE

Appellants, in eighteen separate complaints, were charged with over 100 violations of California Penal Code Sections 311.2 and 311.5 allegedly committed between December 8, 1972 and May 30, 1973. All of the charges were consolidated and appellants, after a jury trial, were found guilty of all of the charges. Consequently, on April 15, 1974, each appellant was sentenced as follows: six months suspended in the Orange County Jail, informal probation for three years, thirty days in the Orange County Jail as a condition of probation, and a $500 fine plus penalty assessments or the serving of 25 days in the Orange County Jail in lieu thereof.

Appellants' convictions were affirmed by the Appellate Department of the Superior Court on March 4, 1975. On March 10, 1975, appellants filed a document entitled an *Application and Order for Stay of Mandate Pending Appeal or Certiorari* and an additional document entitled *Petition for Rehearing/Certification to Court of Appeals, Fourth Appellate District, Division Two.*

On March 12, 1975, the Appellate Department of the Superior Court denied the Petition for Rehearing and Certification *and* the Application for Stay Pending Appeal. On that same date remittitur issued, and the order of the Appellate Department of the Superior Court of Orange County

affirming the judgment was entered on that date.

The records of the Appellate Department of the Superior Court do not reflect the filing of a notice of appeals to this Honorable Court, and the People did not receive a notice of appeals. The only document filed or received by the People of the State of California or by the Appellate Department of the Superior Court is the Jurisdictional Statement filed with this Honorable Court on September 24, 1975.

QUESTIONS PRESENTED

Appellants state the questions presented for resolution by this Court to be as follows:

1. May a penal statute which prohibits the distribution of obscenity contain an exception which provides that the statute "shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed," without denying to other similarly situated persons, such as appellant bookstore clerks, the equal protection of the law?

2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?

3. Does California Penal Code Section 311.2–the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so–violate the First and Fourteenth

Amendments of the United States Constitution?

ARGUMENT

I

Failure To File A Notice Of Appeal Within The Prescribed Period Requires Dismissal Of The Appeal.

Rule 11(2) of the United States Supreme Court Rules prescribes a 90-day time limitation with respect to an appeal from "the judgment of a state court of last resort in a criminal case." As pointed out by Stern and Gressman's *Supreme Court Practice* at page 331:

> "The foregoing time limits for filing notices of appeal may not be extended under any circumstances or for any reason. Since the notice is a simple document to prepare, even simpler than a motion to extend the time would be, this is not an onerous prohibition. Failure to file the notice of appeal within the time prescribed by § 2101 or Rule 11 may result in the dismissal of the appeal by the Supreme Court. *Territo v. United States,* 358 U.S. 279; *Taggart v. New York,* 392 U.S. 667."

II

The Request For Extension Of Time Within Which To Docket The Appeal Was Not Timely.

Although Rule 13(1) allows a Supreme Court Justice the power to extend the time for docketing an appeal, the request

for extension of time must be filed in compliance with Rule 34(2) and the extension should not be beyond the 60 days specified by Rule 13(1). As to all types of appeals, Rule 13(1) provides that for good cause shown a Justice of the Supreme Court "may extend the time for docketing a case for a period not exceeding sixty days." This provision significantly changed the prior open-ended practice whereby docketing extensions could be granted for lengthy and unrestricted periods of time and replaced it by the express provision of Rule 13(1) that such extensions shall not exceed 60 days—a limitation that Rule 22(1) has long imposed on extensions of time for filing petitions for certiorari.

Rule 13(1) specifies that applications for extensions of time in which to docket appeals must specify good cause shown, and that such applications "are not favored"—an admonition repeated in Rule 22(4) as to applications for additional time in which to file petitions for certiorari. The timeliness of these applications is governed by Rule 34(2), which provides that an application of this nature "*must be presented*" to the Clerk of the Supreme Court within the period sought to be extended and "shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period."

In the case at hand, the application was filed September 24, 1975. The judgment became final on March 12, 1975. The 90-day period expired June 12, 1975. The additional 60-day period allowed by Rule 13 expired August 12, 1975, more than one month prior to the filing of the application.

Moreover, where as here the "good cause" is nothing more

than alleged failure of communication between attorneys, the requested extension should be denied because extraordinary circumstances have not been set forth.

III

Appellants' Contention That The Exemption From Prosecution Of Motion Picture Projectionists In California Penal Code Section 311.2(b) Denies Them Equal Protection Of The Laws Is Frivolous.

California Penal Code Section 311.2(b) excludes from prosecutions,

> " . . . a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed."

The California courts have construed the exemption to apply solely and exclusively to projectionists. Thus, in *People v. Stout*, 18 Cal. App. 3d 172, for example, the court stated:

> "We disagree with appellant's interpretation of the statute. 'Motion picture operator' is stated in the alternative to 'projectionist' and is clearly in close association with the latter term. In terms of applicable canons of statutory construction, . . . 'under the rule of *noscitur a sociis* the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.' (*Vilardo v. County of Sacramento*, 54 Cal. App. 2d 413, 420 [129 P.2d 165].) The legislative

> history of this subparagraph, adduced by appellant, fortifies our conclusion that 'motion picture operator' is to be understood in terms of the associated word 'projectionist,' just as in *Vilardo, supra,* 'agent' was to be interpreted in terms of the associated words 'attorney' and 'counsel.' (*Id.* at p. 420.) Thus, in 1968, the relevant term read 'motion picture machine operator' and there was no reference to 'projectionist'; the section was amended in its present form in 1969 and the Legislature made no attempt to broaden the exemption created in the statute beyond the 'motion picture operator' but, on the contrary, further refined the definition of the exempted class by adding, in the alternative, 'projectionist,' a term not susceptible to misinterpretation."

The basic starting point in considering an equal protection argument is that the statute is presumed valid. The burden then is on the defendants to prove that it is unreasonable. As the Court stated in *People v. Western Fruit Growers,* 22 Cal. 2d 494, 506-507:

> "Problems of classification under the California Constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be

> 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. [Citations.]"

Numerous California and federal cases are in accord with the above proposition. For example, as the Court said in *Rast v. Van Deman*, 240 U.S. 342 at 357, 36 S. Ct. 370, 60 L. Ed. 679 at 687:

> "It is established that a distinction in legislation is not arbitrary, *if any state of facts reasonably can be conceived that would sustain it, and that the existence of that state of facts at the time the law was enacted must be assumed* . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." (Emphasis added.)

Richfield Oil Corporation v. Franchise Tax Board, 169 Cal. App. 2d 331 at 336, 337 P.2d 237, quotes as follows from *Madden, Executor v. Kentucky*, 309 U.S. 82 at 88, 60 S. Ct. 406, 84 L. Ed. 2d 590 at 593, 125 A.L.R. 1383 at 1386:

> " . . . The burden is on the one attacking the legislative arrangement to negative every

conceivable basis which might support it."

A classification exempting from prosecution motion picture projectionists is both reasonable and constitutional, for, as stated in *State v. J-R Distributors, Inc.*, 512 P.2d 1049, 1061:

> "There are valid reasons for the classification. The following are by no means exclusive: (1) Book and magazine stores offer a wide range of materials from which both the customer and clerk may select at the time of sale. Each has an opportunity to choose that which will be sold or purchased. On the other hand, motion pictures are shown one reel at a time and the projectionist must exhibit those selected by the manager. (2) Projectionists do not decide which films to exhibit and thus should not be obliged to make a judgment as to their obscenity. Furthermore, to require a projectionist to decide whether the showing of a particular film would be a crime might tend to 'chill' the dissemination of borderline, but constitutionally protected motion pictures."

IV

The Question Of Whether The Provisions Of Rule 106 Of The California Rules Of Court, And The California Constitution Article VI, § 14, Are Constitutionally Deficient In Requiring Written Opinions Upon Appeals Decided By The State Courts Of Appeal But Not In Matters Decided By Appellate Departments Of The California Superior Courts Is Not Justiciable In The Case At Hand.

Article VI, § 14, of the California Constitution, as pertinent herein, provides as follows:

> "Decisions of the Supreme Court and courts of appeal *that determine causes* shall be in writing with reasons stated." (Emphasis added.)

By contrast, Rule 106 of the California Rules of Court, which applies to Appellate Departments of California Superior Courts, states that:

> "The judges of the appellate department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest."

Appellants argue that the failure of the California Constitution to mandate the Appellate Department of the Superior Court to file a written opinion constitutes an invidious discrimination giving rise to a defect of constitutional magnitude. Without reaching (or in any way conceding) the "merits" of appellants' argument, appellee submits that the argument fails because appellants in the case at hand failed to present this issue to the Appellate Department of the Superior Court, even though they did file a Petition for Rehearing. Having failed

to raise the issue in the state court in a timely fashion, appellants are precluded from raising the issue in the present case.

V

The Constitutionality Of The California Penal Code Section 311.2 And Its Compliance With The Mandates Of *Miller v. California,* 413 U.S. 15, Does Not Present A Substantial Federal Question.

Appellants argue that the California statute does not meet the requirements set forth by *Miller v. California* and is therefore unconstitutional. The same identical issue and, in fact, the same identical claim were made by the same attorney in *Miller v. California,* ..... U.S. ..... , 94 S. Ct. 3206. This Honorable Court dismissed that appeal "for want of a substantial federal question." As pointed out by this Honorable Court in *Hicks v. Miranda,* ..... U.S. ..... , 45 L. Ed. 2d 223, 236, that decision was a decision on the merits and refutes the validity of appellants' present claim:

> "That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we

did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one."

CONCLUSION

For all of the above reasons, appellee respectfully submits that the case presents no substantial federal question for determination by this Honorable Court. Additionally, the decision of the state court is so obviously correct that the ends of justice will best be served by this Court's dismissal of the appeal or by this Court's affirmance of the state court's decision on the merits.

Respectfully submitted,

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Attorneys for Appellee.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER 22 1975, I served the within MOTION TO DISMISS OR AFFIRM (Pendleton, et al. vs. People of the State of California) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Appellate Department
Orange County Superior Court
700 Civic Center Drive West
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Attorney General
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Municipal Court of the
Central Orange County Judicial Dist.
700 Civic Center Drive West
Santa Ana, California 92701
For: Hon. Philip E. Schwab,
Judge
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct

Executed on OCTOBER 22nd, 1975, at HUNTINGTON BEACH, CALIFORNIA

D. A. Standefer

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